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No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. W. CUSTER, PETITIONER

v.

ROB. B. MCCUTCHEON, SUBSTITUTED FOR F. M. BRASHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 17) is not reported. The opinion of the Circuit Court of Appeals (R. 40) is reported in 41 F. (2d) 354.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 9, 1930. (R. 45.) The petition for certiorari was filed September 4, 1930. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of execution may issue on a judgment for money entered in the United States District Court for the District of Idaho in favor of the United States after a period of five years from the date of the entry of the judgment.

STATUTES AND RULES OF COURT INVOLVED

The statutes and rules of court involved are set forth in the discussion of this case, *infra*.

STATEMENT

On March 7, 1921, the United States recovered judgment against the petitioner in the United States District Court for the District of Idaho, in the sum of $2,086.87. (R. 8.) On September 21, 1929, a writ of execution was issued out of the District Court upon this judgment (R. 9), under which execution the United States Marshal on October 9, 1929, made a levy upon moneys of the petitioner on deposit in a bank at Shoshone, Idaho. (R. 8.) On October 10, 1929, the petitioner filed a bill in the District Court seeking to enjoin the Marshal from withdrawing the moneys of petitioner on deposit in the bank, and from applying it to the satisfaction of the judgment above described. The bill set forth the facts above stated and alleged that the judgment was unenforceable by reason of the Statute of Limitations, and that the execution issued thereunder was void. (R. 7–11.) A temporary restraining order was entered by the

District Court (R. 13–14), and thereupon the Marshal moved to dismiss the complaint upon the ground that it did not state sufficient facts to entitle the plaintiff to the relief sought (R. 16).

The District Court dismissed the complaint and set aside the temporary restraining order. (R. 20–21.) Upon appeal to the Circuit Court of Appeals this judgment was affirmed. (R. 45.)

ARGUMENT

On March 7, 1921, the United States recovered judgment against the petitioner for $2,086.87 in the United States District Court for the District of Idaho. The question presented is whether a writ of execution may issue on this judgment more than five years after the entry of the judgment.

Section 6910 of the Idaho Compiled Statutes of 1919 provides that—

> The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Section 916 of the United States Revised Statutes (U. S. C., Title 28, Sec. 727) provides that:

> The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held,

or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Rule 73 of the United States District Court for the District of Idaho, promulgated March 15, 1924, provides:

* * * * *

Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments, and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this Court; and the Marshal of this court shall conform his proceedings thereto. * * *

The petitioner contends that Section 6910 of the Idaho Compiled Statutes, as adopted by Section 916 of the United States Revised Statutes, is not a statute of limitations, but a statute of creation, giving rise to new rights; that the United States, having adopted the State statute, must take the

same subject to the limitation that execution may issue only within five years from the date of judgment; and that accordingly the doctrine that the sovereign is not bound by statutes of limitations is not applicable to the instant case.

Section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81 (Section 716, Revised Statutes; U. S. C. Title 28, Sec. 377) provided that the Federal courts should have power to issue writs of *scire facias* and "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In *United States Bank* v. *Halstead,* 10 Wheat. 51, 56, this Court said that the statute quoted embraced writs of execution, and not only such writs as were authorized by the common law, but such writs of execution as were in use in the State courts at the time. This statute was modified by the Act of September 29, 1789, c. 21, 1 Stat. 93, declaring that the forms of writs of executions and modes of process in the circuit and district courts in suits at common law should be the same in each State as were used or allowed in the Supreme Court of that State. This latter statute, as thereafter amended, became Section 916 of the Revised Statutes.

The rest of the argument in behalf of the respondent is well expressed in the following extract from the opinion of the Circuit Court of Appeals in the instant case (R. 42–43):

* * * the right of a judgment creditor to execution process does not have its origin in the state statute; it existed at common law. 3 Cooley's Blackstone, 431; Freeman on Execution, 3d ed., Sec. 27. The statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. *Coombs* v. *Jordan*, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am. Dec. 236, 271. See, also, *Nimmo's Executor* v. *Commonwealth*, 4 Hen. & M. (Virginia Rep. Ann.) 57. While we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the view that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect of taking out execution process upon the judgment. In the absence of some expression to the contrary it is therefore to be presumed the legis-

lature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a preexisting right of one class of judgment creditors.

Petitioner relies upon *Fink* v. *O'Neil*, 106 U. S. 272. In that case it was held that the homestead of a judgment debtor was not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action in a Federal court in Wisconsin, because of the provisions of the Wisconsin statute exempting homesteads from seizure and sale on execution. The opinion of the Court at the outset considered the question whether the State would be bound by the exemption. It construed the Wisconsin statute as forbidding seizures of homesteads even by that sovereign, and held that the adoption of the Wisconsin law by the Conformity Act operated as an adoption of the exemption of homesteads from seizure on execution even in suits by the United States. Although the opinion contains language which furnishes some support for the contention of petitioner, we submit that the ground for decision is that indicated above. The Idaho statute limiting the time for taking out executions should be construed as not applying to the State of Idaho. The Circuit Court of Appeals so held. The Idaho courts have not passed upon the point. It is significant

that Chapter 250 of the Idaho Compiled Statutes, 1919, relating to the time for commencing civil actions, contains an express provision (Section 6618) that "The limitations prescribed *in this chapter* apply to actions brought in the name of the state," but that there is no similar provision in Chapter 257, relating to executions, in which occurs Section 6910, quoted on p. 3, *supra*. There seems to be a dearth of authority as to whether statutes in other States similar to Section 6910 of the Idaho statutes apply to the sovereign. In *Villescas* v. *Arizona Copper Co.*, 20 Ariz. 268, the court held that a similar Arizona statute did not apply to the United States. See also *United States* v. *Noojin*, 155 Fed. 377 (S. D. Ala.).

Petitioner asserts that the decision in the instant case is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Harpootlian*, 24 F. (2d) 646. There the court held that that part of a State statute which limited the duration of a judgment lien was binding upon the United States. The court there pointed out that at common law a judgment did not create a lien on real estate and that the statute in question which created the lien provided in express terms the period of its existence. Consequently, the decision does not appear to conflict with that in the instant case, which involves a writ of execution, which did not originate in the State statute.

CONCLUSION

Although the question in the instant case is not free from doubt, we contend that the decision of the courts below was correct. The question appears to be one of infrequent occurrence and of little importance. In view of this and the fact that there is no direct conflict of authority on the point, we submit that the petition should be denied.

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